

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

APPLE INC,

Plaintiff,

v.

MASIMO CORPORATION and SOUND
UNITED, LLC,

Defendants.

Civil Action No. 22-1377 (MN)

**DECLARATION OF BRIAN HORNE IN SUPPORT OF DEFENDANTS MASIMO
CORPORATION AND SOUND UNITED, LLC'S OPPOSITION TO PLAINTIFF
APPLE INC.'S MOTION FOR EXPEDITED DISCOVERY**

(Vol. 1 of 3)

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Dated: November 17, 2022

**IN THE U.S. DISTRICT COURT
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APPLE INC.,

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MASIMO CORPORATION and
SOUND UNITED, LLC,

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C.A. No. 1:22-cv-01377-MN

**DECLARATION OF BRIAN HORNE IN SUPPORT OF
DEFENDANTS MASIMO CORPORATION AND SOUND UNITED, LLC'S
OPPOSITION TO PLAINTIFF APPLE INC.'S
MOTION FOR EXPEDITED DISCOVERY**

I, Brian Horne, declare as follows:

1. I am a partner with the law firm of Knobbe, Martens, Olson & Bear, LLP, counsel of record for Defendants Masimo Corporation and Sound United, LLC in the above-captioned matter. I have personal knowledge of the matters set forth herein and if I am called upon to testify, I could and would testify competently thereto.

2. Reproduced below is a side-by-side comparison of Apple Watch Series 4 and the W1® excerpted from D.I. 1 ¶ 3 with annotations added to illustrate the number and position of side buttons.



3. Reproduced below is a side-by-side comparison of Apple Watch Series 4 and the W1® excerpted from D.I. 1 ¶ 3 with annotations added to illustrate the watch bands.



4. Reproduced below is a side-by-side comparison of Apple Watch Series 4 and the W1® excerpted from D.I. 1 ¶ 3 with annotations added to illustrate the band attachment mechanisms.



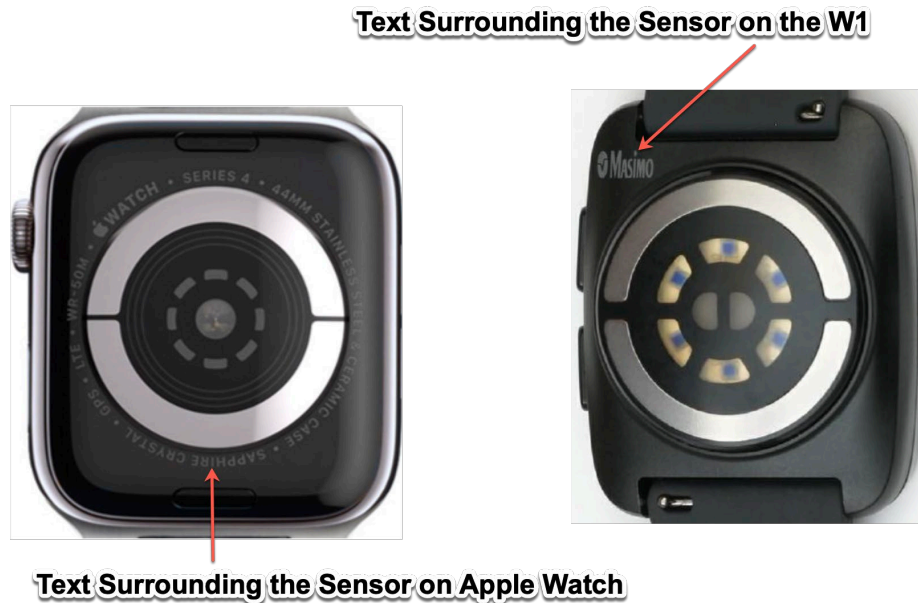
5. Reproduced below is a side-by-side comparison of Apple Watch Series 4 and the W1® excerpted from D.I. 1 ¶ 3 with annotations added to illustrate the number of LED sets around the sensors.



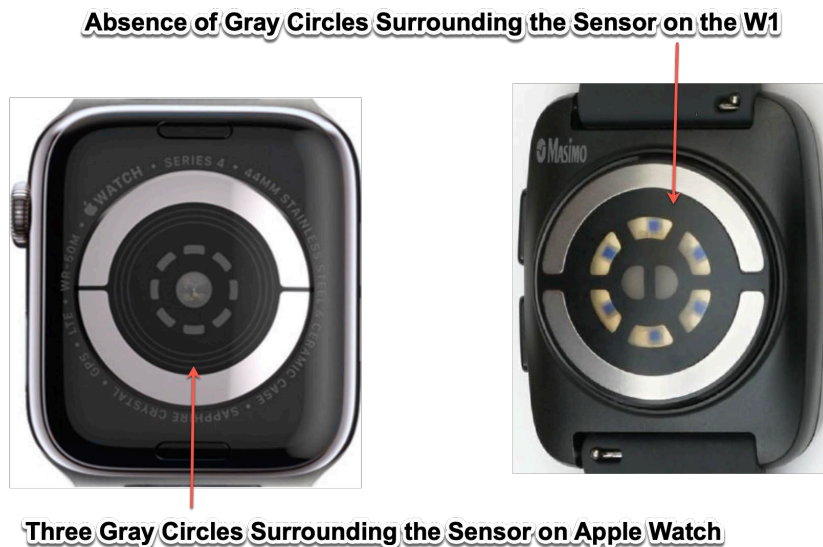
6. Reproduced below is a side-by-side comparison of Apple Watch Series 4 and the W1® excerpted from D.I. 1 ¶ 3 with annotations added to illustrate the numbers of photodetector sets around the sensors.



7. Reproduced below is a side-by-side comparison of Apple Watch Series 4 and the W1® excerpted from D.I. 1 ¶ 3 with annotations added to illustrate text around the sensors.



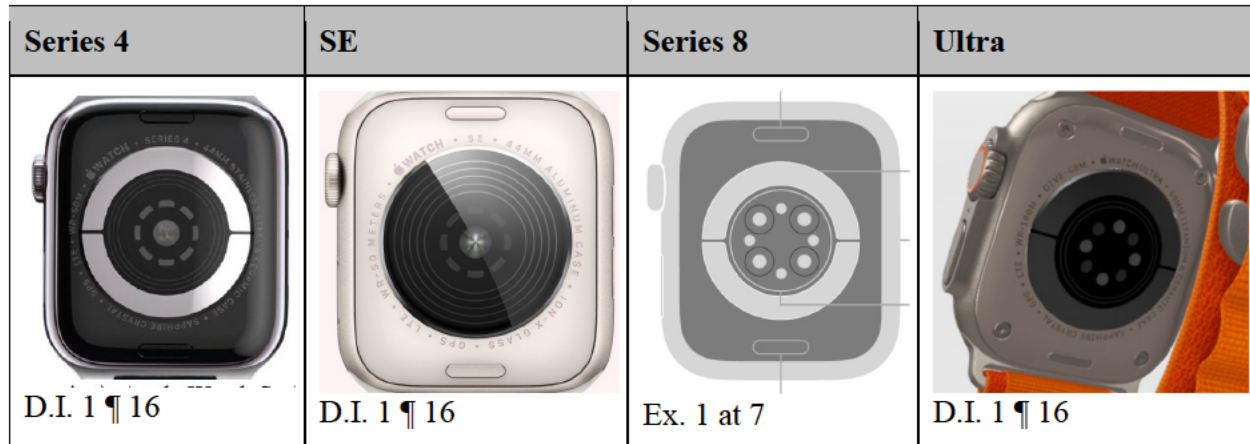
8. Reproduced below is a side-by-side comparison of Apple Watch Series 4 and the W1® excerpted from D.I. 1 ¶ 3 with annotations added to illustrate presence or absence of gray circles around the sensors.



9. Attached hereto as **Exhibit 1** is a true and correct copy of the document available at the following link (retrieved on Nov. 17, 2022):

https://help.apple.com/pdf/watch/9/en_US/apple-watch-user-guide-watchos9.pdf.

10. Reproduced below is a side-by-side comparison of Apple Watch Series 4 and the subsequent generations of Apple watches.



11. Attached hereto as **Exhibit 2** (Masimo's Dec. 12, 2012 Press Release re: iSpO2) is a true and correct copy of content available at the following link (retrieved on Nov. 17, 2022 and excerpted below):

<https://investor.masimo.com/news/news-details/2012/Masimo-Launches-iSpO2supsup---Commercially-Available-Pulse-Oximeter-for-iPhone-iPad--iPod-touch/default.aspx>.

Dec. 12, 2012. . . . In keeping with its commitment to excellence and innovation, Masimo (NASDAQ: MASI) today announced the debut of the iSpO2™ pulse oximeter cable and sensor with Measure-Through Motion and Low Perfusion Masimo SET® technology for use with iPhone, iPad or iPod touch with 30-pin connector. . . . iSpO2™ uses the same technology found in Masimo's breakthrough line of pulse oximeters and Pulse CO-Oximeters™ - the standard-of-care pulse oximetry technology at work in leading hospitals around the world - providing accurate measurements, even during the challenging conditions of motion and low perfusion. . . . Customers can purchase the iSpO2™ Signal Extraction Pulse Oximeter and use their iPhone, iPad or iPod touch to check their own blood oxygenation (SpO2), pulse rate, and perfusion index measurements for sports and aviation use and is not intended for

medical use. . . . After purchasing the iSpO2™ (available at iSpO2.com and Amazon) and connecting it to an iPhone, iPad or iPod touch, the iSpO2™ application will automatically download.

12. Attached hereto as **Exhibit 3** (Sept. 12, 2018 Apple Watch Series 4 Release) is a true and correct copy of the content available at the following link (retrieved on Nov. 17, 2022):

<https://www.apple.com/newsroom/2018/09/redesigned-apple-watch-series-4-revolutionizes-communication-fitness-and-health>.

13. Attached hereto as **Exhibit 4** (Sept. 15, 2020 Apple Watch Series 6 Release) is a true and correct copy of the content available at the following link (retrieved on Nov. 17, 2022):

<https://www.apple.com/newsroom/2020/09/apple-watch-series-6-delivers-breakthrough-wellness-and-fitness-capabilities>.

14. Attached hereto as **Exhibit 5** (Apple Watch Not Intended For Medical Use) is a true and correct copy of the content available at the following link (retrieved on Nov. 17, 2022 and excerpted below (emphases added)):

<https://support.apple.com/en-us/HT211027>.

How to use the Blood Oxygen app on Apple Watch

The Blood Oxygen app can allow you to measure the oxygen level of your blood on-demand directly from your wrist, providing you with insights into your overall wellness.



Measurements taken with the Blood Oxygen app are **not intended for medical use** and are only designed for general fitness and wellness purposes.

The Blood Oxygen app is only available in certain countries and regions.

Things you should know

- Blood Oxygen app measurements are **not intended for medical use**, including self-diagnosis or consultation with a doctor, and are only designed for general fitness and wellness purposes.
- The Blood Oxygen app is designed for users who are at least 18 years old.


15. Attached hereto as **Exhibit 6** (Masimo's Feb. 15, 2022 SEC Filing re: Sound United) is a true and correct copy of the content available at the following link (retrieved on Nov. 17, 2022 and excerpted below):

<https://www.sec.gov/Archives/edgar/data/937556/000093755622000024/masi-q42021earningspres.htm>.



Introducing The Masimo W1: Continuous Health Monitoring Watch ⁽¹⁾

Masimo W1™ Overview

- Leverages proprietary SET® Pulse Oximetry technology
- Continuous monitoring of multiple parameters including oxygen saturation (SpO₂), pulse rate and respiratory rate (RR)
- Fall detection, steps and electrocardiogram (ECG)
- Integrated with the Masimo SafetyNet® Platform for telehealth
- Ideal for patients needing monitoring outside the hospital
- Platform with broad expansion opportunities across multiple use cases and users



Sound United: Premium Consumer Technology Leader

Business Overview		Iconic Premium Brands			
<ul style="list-style-type: none"> • Iconic and universally-recognized brands with entrenched relationships into consumer channels • Long heritage of excellence in premium audio technologies • Fully-integrated wireless software platform, including HEOS Ecosystem connecting devices and networks in the home. 					
Blue-Chip Customer Relationships					
					
Key Stats					
\$1.025B Purchase Price	~\$0.9B CY 2021E Revenue	~\$125mm CY 2021E Adj. EBITDA	Double-Digit CY 2021E Revenue Growth	HSD Long-Term Growth	20,000 Points of Retail & Install Distribution

Masimo: Connected In Hospital, Connected At Home

Masimo in Hospital



Masimo in Home & On-the-Go







Suite of interconnected health & consumer wellness solutions across both hospital & home






Strategic Expansion of Masimo

Non-Invasive Patient Monitoring

Hospital Automation & Connectivity

Telehealth, Telemonitoring, Hospital-At-Home & Consumer Health and Wellness

History
Today
Tomorrow

16. Attached hereto as **Exhibit 7** (Masimo's Feb. 15, 2022 Press Release re: Sound United-and-W1) is a true and correct copy of the content available at the following link (retrieved on Nov. 17, 2022):

<https://www.soundunited.com/news/sound-united-enters-into-agreement-to-be-acquired-by-masimo-corporation>.

17. Attached hereto as **Exhibit 8** (Masimo's 2022 Proxy Statement) is a true and correct copy of the content available at the following link (retrieved on Nov. 17, 2022 and excerpted below (emphases added)):

<https://www.sec.gov/Archives/edgar/data/937556/000093755622000074/masi-20220404xscheduledef1.htm>.

Our newest offering in our telehealth product suite is the Masimo Watch W1®. *The W1® wearable monitor is expected to be released worldwide in the second quarter of 2022.* The W1® is a versatile product that uses Masimo SET® technology to obtain oxygen saturation Our recent announcement to acquire Sound United is the next step in our home setting strategy, which we expect will support Masimo's vision and strategy of enabling connected monitoring across both the hospital and home. We see significant opportunities to combine and leverage the technologies, bringing Masimo's clinically superior solutions into the home *We plan to leverage [Sound United's] well-established reputation and presence in the home to accelerate our success in gaining adoption of our integrated home-based telemedicine solutions, starting with the W1®.*

18. Attached hereto as **Exhibit 9** (Masimo's May 2, 2022 Press Release re: W1® Limited Market Release) is a true and correct copy of the content available at the following link (retrieved on Nov. 17, 2022 and excerpted below (emphases added)):

<https://investor.masimo.com/news/news-details/2022/Medical-Monitoring-Pioneer-Announces-the-Limited-Market-Release-of-the-Masimo-W1-Watch-for-Consumers/default.aspx>.

Masimo . . . marks its 33rd anniversary today by announcing *the limited market release of the W1™ health watch for consumers.* . . . *SET® pulse oximetry, . . . featur[ing] the industry's highest accuracy specifications, . . . and now, as the foundational technology driving the W1,* has become a truly lifestyle-friendly technology for consumers outside hospitals. . . . For the limited market release of W1, Masimo is inviting a select group of *early adopters to help evaluate and refine the product over the coming months.* Masimo will provide up to 10,000 W1s on a first-come, first-served basis, at a 50% discount, to users who agree to the program details and to provide feedback and data to Masimo. . . . *With this consumer release of W1, Masimo is bringing its expertise in medical monitoring, connectivity, and automation to consumers looking to take control of their personal health"*

19. Attached hereto as **Exhibit 10** (Aug. 31, 2022 Press Release re: W1® Full Market Release) is a true and correct copy of the content available at the following link (retrieved on Nov. 17, 2022 and excerpted below (emphases added)):

<https://www.masimo.com/company/news/news-media/#eccc62f2-a423-4e81-a064-57ddc48c8a13>.

Masimo . . . today announced the *full market release* of the Masimo W1™ health watch for consumer use. The first of its kind, the Masimo W1 offers accurate, continuous measurements and insightful health data – from the leader in hospital pulse oximetry – in a personal, lifestyle-friendly, wrist-worn wearable. . . . Dr. Amin, Professor of Medicine and Endowed Chair of Medicine at the University of California, Irvine, noted, “Masimo continues to innovate elegant noninvasive solutions to complex problems. The release of the Masimo W1 watch raises the bar on home wearables by *providing pulse oximetry based on industry-leading SET® technology* and continuous monitoring features in a wrist-worn device. By doing so, we can follow our health and fitness beyond the home, to any location that has cell phone connectivity. I have personally worn Masimo W1 and am impressed by its comfort and stylish look – while able to continuously monitor my oxygen level, follow my step count, and track other health parameters, both at rest and during activity.”

20. Attached hereto as **Exhibit 11** (Masimo’s Radius-7) is a true and correct copy of the content available at the following link (retrieved on Nov. 17, 2022 and excerpted below):

<https://www.masimo.com/products/continuous/radius-7>.



Radius-7®

Masimo SET® Measure-through Motion and Low Perfusion and rainbow SET™ Technology in a Tetherless, Wearable Patient Monitor

The Power of Masimo's Breakthrough Measurements in a Patient-worn Monitor

With Masimo SET® and rainbow Acoustic Monitoring® technology and wireless communication, Radius-7 is designed to allow patient mobility along with continuous monitoring.

Small, lightweight, wearable design promotes patient comfort and ambulation

- Eliminates the need for clinicians to disconnect the monitor each time the patient gets out of bed
- Two "hot-swappable," rechargeable modules minimize monitoring interruption

Wireless connectivity

- Communicates via Bluetooth® to Root® for continuous bedside monitoring and alarm notifications
- When out of Bluetooth range, Radius-7 communicates via Wi-Fi to Masimo Patient SafetyNet™ for continuous supplemental monitoring and remote clinician alarm notifications*
- When out of Bluetooth and Wi-Fi range, Radius-7 acts as a standalone, wearable monitor which stores up to 6 hours of data



21. Attached hereto as **Exhibit 12** (Masimo's Root Platform) is a true and correct copy of the content available at the following link (retrieved on Nov. 17, 2022 and excerpted below):

<https://www.masimo.com/products/continuous/root.>

Root Platform

Expandable, Customizable Patient Monitoring and Connectivity Platform

Root is a powerful, expandable patient monitoring and connectivity hub that integrates an array of technologies, devices, and systems to provide multimodal monitoring and connectivity solutions – in a single, clinician-centric platform.

Root's plug-and-play expansion capabilities allow clinicians to centralize patient monitoring by bringing together advanced rainbow SET® Pulse CO-Oximetry, brain function monitoring, regional oximetry, and capnography measurements on an easy-to-interpret, customizable display, empowering clinicians with more information for making patient assessments. Further, Root serves as a central connectivity hub, with automated electronic charting of Masimo and third-party device data to patient data management systems (PDMS), which may improve clinician workflows through the reduction of manual data documentation.



Customization Simplified

Root features an instantly interpretable, high-visibility display with intuitive, multi-touch navigation for easy and adaptable use in hospital environments. Clinicians can customize the Root display to feature the most applicable data for the current patient or case.



Flexible Measurement Expansion

Root offers expandable measurement capability through software upgrades and Masimo Open Connect® (MOC-9®) modules – including Next Generation SedLine® Brain Function Monitoring, O3® Regional Oximetry, and ISA™ Capnography modules. Third-party measurement expansion allows other companies to expand the Root platform with their own technology, while following Masimo's established development and validation process.

22. Attached hereto as **Exhibit 13** (Bibliography re: Clinical Superiority of SET® Pulse Oximetry) is a true and correct copy of Masimo SET® Pulse Oximetry Bibliography, admitted as exhibit CX-0777 during the evidentiary hearing held June 6-10, 2022 at the U.S.

International Trade Commission in *In the Matter of Certain Light-Based Physiological Measurement Devices and Components Thereof*, Inv. No. 337-TA-1276.

23. Attached hereto as **Exhibit 14** (June 6-10, 2022 ITC Hearing Tr.) is a true and correct copy of the public version of the combined transcript of the evidentiary hearing held June 6-10, 2022 in *Certain Light-Based Physiological Measurement Devices*, Inv. No. 337-TA-1276.

24. Attached hereto as **Exhibit 15** (Masimo's 2018 10-K) is a true and correct copy of the content available at the following link (retrieved on Nov. 17, 2022):

<https://www.sec.gov/Archives/edgar/data/937556/000093755618000019/masi-20171230xform10k.htm>.

25. Attached hereto as **Exhibit 16** (Masimo's 2021 10-K) is a true and correct copy of the content available at the following link (retrieved on Nov. 17, 2022):

<https://www.sec.gov/Archives/edgar/data/937556/000093755621000033/masi-20210102.htm>.

26. Attached hereto as **Exhibit 17** (Masimo's 2022 10-K) is a true and correct copy of the content available at the following link (retrieved on Nov. 17, 2022):

<https://www.sec.gov/Archives/edgar/data/937556/000093755622000031/masi-20220101.htm>.

27. Attached hereto as **Exhibit 18** (Apple Watch Review Washington Post) is a true and correct copy of the content available at the following link (retrieved on Nov. 17, 2022 and excerpted below (emphasis added)):

<https://www.washingtonpost.com/technology/2020/09/23/apple-watch-oximeter>.

Both the Apple Watch Series 6 and Fitbit Sense have new blood-oxygen apps. They're mostly useless.

28. Attached hereto as **Exhibit 19** (Apple Watch Review USA Today) is a true and correct copy of the content available at the following link (retrieved on Nov. 17, 2022 and excerpted below (emphasis added)):

<https://www.usatoday.com/story/tech/2020/10/02/apple-watch-heart-monitoring-false-alarms-study/5893020002>.

Heart monitoring technology in smartwatches can be life-saving. *It may also lead to false-positive results, unnecessary visits to the doctor and needless anxiety among users*, medical researchers warn.

A study published in the Journal of the American Medical Informatics Association found that only 11.4% of patients who visited a Mayo Clinic after receiving alarming heart rhythm results from their Apple Watch were actually diagnosed with actionable heart conditions.

29. Attached hereto as **Exhibit 20** (Radius PPG) is a true and correct copy of the content available at the following link (retrieved on Nov. 17, 2022):

<https://www.masimo.com/products/sensors/radius-ppg>.

30. In relation with *Masimo Corp. v. Apple Inc.*, No. 20-0048, D.I. 970 (C.D. Cal. Oct. 28, 2022) (Special Master's Order No. 16 re: Discovery Issues), Apple and Masimo filed their briefs under seal. Masimo sought Apple's permission to submit those briefs with this opposition. Apple denied Masimo's request.

31. Steve Jensen resigned his position as a director on the Board of Directors of Cercacor Laboratories, Inc. on December 8, 2021.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 17, 2022 in Irvine, California.

/s/ Brian C. Horne

Brian C. Horne